FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZJQN v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 1550*

MIGRATION – RRT decision – Pakistani fearing reprisal attacks from Muslim extremist organisation – Tribunal materially relied upon mistranslation of evidence at hearing – failed to address contended inadequacy of state protection – jurisdictional errors found – matter remitted.

Migration Act 1958 (Cth), ss.425, 474(1), 476

M175 of 2002 v Minister for Immigration & Citizenship [2007] FCA 1212
Minister for Immigration & Multicultural & Indigenous Affairs v SCAR (2003) 128 FCR 553
Minister for Immigration & Multicultural Affairs v Prathapan (1998) 86 FCR 95
Minister for Immigration & Multicultural Affairs v Respondents S152/2003 (2004) 222 CLR 1
Perera v Minister for Immigration & Multicultural Affairs (1999) 92 FCR 6
SGNB v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 132 FCR 192
SZDWR & Anor v Minister for Immigration & Multicultural & Indigenous Affairs & Anor (2006) 149 FCR 550
SZEQI v Minister for Immigration & Anor [2005] FMCA 1615
SZEQI v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCAFC 94
SZFDE v Minister for Immigration & Citizenship [2007] HCA 35
VWFY v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 1723

Applicant:	SZJQN
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG3260 of 2006
Judgment of:	Smith FM

Hearing date:	20 August 2007
Delivered at:	Sydney
Delivered on:	20 August 2007

REPRESENTATION

Counsel for the Applicant:	Mr J Gormly
Solicitors for the Applicant:	Legal Aid Commission of NSW
Counsel for the First Respondent:	Mr G Kennett
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

(1) A writ of certiorari issue directed to the second respondent, quashing the decision of the second respondent handed down on 5 October 2006 in matter 060431029.

(2) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 31 March 2006.

(3) The first respondent must pay the applicant's costs in the sum of $5,000.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG3260 of 2006

SZJQN
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. This is an application filed on 8 November 2006, which has been set down for final hearing under s.476 of the *Migration Act 1958* (Cth) in respect of a decision of the Refugee Review Tribunal dated 25 September 2006 and handed down on 5 October 2006. The Tribunal affirmed the decision of a delegate made on 31 March 2006, refusing to grant a protection visa to the applicant.

2. Under s.476 the Court has *"the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution"*, but its powers are confined by s.474(1) so that I do not have power to remit the matter to the Tribunal unless the Tribunal's decision was affected by jurisdictional error. I do not have power myself to decide whether the applicant qualifies for a protection visa or any other permission to stay in Australia.

3. The applicant arrived in Australia in January 2006 with a visa granted to him as a journalist to cover a cricket series. On 14 February 2006 he applied for a protection visa, revealing no person assisting him in this application. In typed answers to the application form, he explained why he sought protection in Australia against return to his country of nationality, Pakistan. I shall not detail the precise nature of his claimed history.

4. Briefly, he claimed that while employed as a cameraman in Pakistan he had been sent to obtain video footage showing a madrassa which was alleged to have a connection to the perpetrators of an atrocity elsewhere in the world. This footage, he said, was shown on television with a commentary reporting the suggested association. Shortly after the airing of the report, the identified reporter of the news item was telephoned and threatened, and a day or two later the applicant also received threatening telephone calls. He understood them to have been made by members of an extremist Muslim organisation connected with terrorists. He claimed that some months later:

> *On [date and time] after work I was riding my motor bike heading to my [location] I was confronted by two men claiming they are from [the terrorist organisation]. They pushed me off the bike and brutally bashed me and threatened me they will kill me because I covered the news of [the organisation] which has been shown on TV; damaged the repute of their organisation. "MAN YOU WILL BE DEAD".*
>
> *Later I have been treated in hospital for sustained injuries and reported the incident to the local police station.*

5. The applicant presented medical evidence confirming the assault and contemporaneous newspaper reports, and also evidence confirming that he had made a complaint to the police. The applicant said:

> ***41 What do you fear may happen to you if you go back to that country?***
>
> *As I have mentioned in Q 40 that I have been attacked by the member of [the] organization following the coverage of news report been shown on TV covered by me and my colleges reporter Mr M. After lodging the official complains to the authorities the assailant are still not yet apprehended.*

I have great concern of my life safety.

I strongly believe that authorities in Pakistan failed to protect my life because [the organisation] has very strong influence in Pakistan to kill a person like me is very easy target for them.

…

44 Do you think the authorities of that country can and will protect you if you go back? If not, why not?

Authorities in Pakistan are hopeless and failed to give me protection because I have continuously received death threats by [the organisation's members] but police did not make any effort to arrest any of those perpetrators.

My concern fear is that police in Pakistan think these kinds of threats is a routine matter because I am an ordinary working class citizen of Pakistan not a dignitary to be cared and looked after.

I have good reason to leave Pakistan following the death threats and brutally bashed by the [organisation's] members. I was sick of living a life full of fear. I have great concern of my life safety.

Therefore I am taking this opportunity to seek asylum in Australia so I can live fear free life and enjoy the tolerance in humanity. I shall be great full if I have been granted a protection visa in Australia. It will provide me the opportunity to contribute on the Australian soul by utilizing my skills and talent in the civilized society.

6. A delegate refused the application, and gave brief reasons:

I accept the applicant's claim about the attack on him by members of the [organisation]. He provided copies of newspaper articles which mentioned his name and which reported the incident in which he was physically attacked. I also accept that the motive behind the attack on the applicant was the perception that he was politically opposed to the militant group. However, I do not accept that the government of Pakistan is unable to protect the applicant.

Various information from independent sources cited above indicate that the current government of Pakistan is determined to get rid of militants in the country. The President of the United

States views the Pakistani President as an important ally in waging war against Islamic militants. There is no indication that the militants in Pakistan are getting the upper hand in this conflict against the government. There is evidence to show that the Pakistani government is able to protect its citizens from harm perpetrated by militant Islamic groups.

I do not accept that the applicant cannot seek protection from the Pakistani government. His assailants appear to belong to a not so significant group. Whilst the group members were successful in harming him, it cannot be said that at that the government of Pakistan has failed to protect the applicant. The recent efforts of the Pakistani authorities to control the militants is an indication that protection is available to the Pakistani citizens including the applicant.

As effective protection is available to the applicant, I find that he does not face a real chance of being persecuted should he return to Pakistan in the foreseeable future. His fear of persecution is consequently not well-founded.

7. On appeal to the Tribunal, the applicant was assisted by a solicitor who presented a submission clearly taking issue with the reasoning of the delegate that there was "effective State protection" available to the applicant in Pakistan. His submission included the following passages:

> *With the utmost respect to the delegate, there is much in the country information adduced to allegedly support a finding of effective state protection that actually serves to undermine such a view. For example, the information discloses that:*
>
> 1. *Pakistan is* **a refuge for terrorists**, *both local and international*
>
> 2. *The Pakistani army* **struggles to root out militants** *despite* **assigning 80,000 troops to the task (in the Northwest Frontier)**
>
> 3. *Calls made by militant clerics to fight the Pakistani army in North Waziristan are answered by tribal leaders*
>
> 4. *Some US officials* **have questioned** *Musharraf's desire to aggressively battle militants*

5. *Pakistan's neighbours and western governments continue to* **critically scrutinize Pakistan's commitment to the war on terrorism.**

Of course, the Tribunal is not bound by the delegate's findings or the material upon which those findings are based.

I submit that a resolution of this matter depends upon whether effective state protection is available to [the applicant]. An affirmative finding to this issue will bleach the well foundedness of my client's fear of suffering persecution. A finding of ineffective state protection, however will provide an objective basis to [the applicant's] fear of suffering persecution in Pakistan.

My submission is my client's fear is well founded.

Firstly, there are credible allegations emerging from the independent material of State complicity in fostering terrorism and those responsible for committing terrorist acts. The material, for example, refers to Pakistan as **"a refuge for terrorists"**. *Pakistan's commitment to the war on terrorism is* **"critically scrutinized"** *by Western governments. Historically, Pakistan's military and intelligence services include* **"personnel sympathetic to Islamist militants"**. *It is indisputable that there can be no question of state protection where the State itself is complicit in the persecutory conduct or condones or tolerates persecutory conduct.*

Secondly, I submit there is a lack of State protection emanating from my client's occupation as a television cameraman. There is material attached hereto which serves to support the contention that journalists and others involved in media in Pakistan are differentially exposed to a risk of harm and that risk is not allayed by the prospect of state protection. That is to say, the material indicates that my client's occupation as a journalist compromises the adequacy of state protection because the State on occasion has discriminated against journalists and other media personnel. The material indicates, for example, that police in Pakistan have been responsible for the harassment of journalists; that journalists and reporters have suffered an increasing number of violent attacks; and that media intimidation undermines a free press in Pakistan.

Thirdly, I maintain that even in the absence of State complicity or toleration the Pakistani government is incapable of discharging its obligation to protect persons in the position of [the applicant]

> *from threats of harm made by Islamist militants. Insufficient state protection is not rooted in any lack of resources. This is because terrorist attacks instigated by fundamentalist Islamist militants, whether against targetted groups of people or individuals, are by their very nature uncontrollable. The material attached hereto averts to the very high threat of terrorism throughout Pakistan and to the fact that militants continue to target Western interests and individuals identified as infidels or anti-Islamist. This prevailing risk is, admittedly, one faced by members of the Pakistani population; however the risk is amplified in the case of [the applicant] who has been specifically earmarked by militants as an individual who has betrayed Islam.*
>
> *In summary, I submit that in the circumstances of this case there is an insufficiency of state protection. This is because evidence suggests that the conduct about which [the applicant] complains is tolerated by the State. Terrorist organizations are prevalent in Pakistan; the threat of terrorist attacks by militants remains high; kidnappings, bombings, assassinations and assaults inform the existence of such a threat which remains undiminished by the effluxion of time.*
>
> (emphasis in original)

8. The applicant presented further material for the Tribunal including by way of statutory declaration, and much country information concerning insecurity in Pakistan and harms suffered by journalists in particular, including at the hands of government agencies.

Ground 1 – significant mistranslation of evidence

9. The applicant attended a hearing on 22 August 2006 to which he was invited by the Tribunal. His solicitor was present, and the Tribunal provided an interpreter who is recorded as being qualified at the NAATI Level 3. A transcript of what was said in English at the hearing is in evidence before me, and there is no suggestion in the course of that transcript that the attention of the Tribunal, or of the applicant's solicitor, was ever drawn to inadequacies of translation to English from the Urdu language spoken by the applicant.

10. In the course of the hearing, the Tribunal identified what it thought were two significant inconsistencies in the applicant's evidence. From a post-hearing submission forwarded by the solicitor about a week after

the hearing, it seems that the applicant's solicitor was also left with the impression that his client gave inconsistent evidence, and his submission sought to explain the principal inconsistency. This concerned whether the applicant claimed, and then resiled from claiming, that his name had been given to the terrorist organisation by the reporter, Mr M, in a telephone call to Mr M which preceded a threatening call to the applicant.

11. The applicant now presents to this Court an affidavit by an expert translator revealing errors of translation at the hearing. His expertise has not been challenged by the Minister, nor have his corrections to the transcript. I shall set out the critical passage concerning the perceived principal inconsistency, as corrected by the expert:

> ***APPLICANT:*** *… When I was covering[1] t[2]he same night, the news was spread on there. The next day, Mr M[3] received a phone from a private number saying that, "You have done wrong. You have defamed our madrassa. We are not going to spare your life." He said that, in his defence, "I didn't do anything. I have just filed the story. It was cameraman who made news footage and named your madrassa." They used abusive words, threatening him and say that they are going to see you and[4] the cameraman - - -*
>
> ***TRIBUNAL:*** *So are you telling me that the journalist told them your name?*
>
> ***APPLICANT:*** *Yes.*
>
> ***TRIBUNAL:*** *Why did he do that?*
>
> ***APPLICANT:*** *I don't know. The next day I received a phone call. They abused me, threatened me and said that all this you have done, we have come to know why. We have talked to the reporter as well and we know that you have done all this.*
>
> ***TRIBUNAL:*** *Sorry, talked to the what – reporter, did you say?*

[1] ***Inserted:*** *When I was covering*

[2] ***Deleted:*** *T*

[3] ***Deleted:*** *[name corrected]*

[4] ***Inserted:*** *you and*

INTERPRETER: *Reporter.*

APPLICANT: *I asked, Mr M[5] [6]you have mentioned my name. He said, "I did not mention your name in that way, not in that way they have interpreted." He said that, "The way they have obtained my phone number and my details, they have obtained your phone number and your name[7] as well."*

TRIBUNAL: *I'm just a bit confused about this. They rang the journalist and threatened him. Is that what you're saying?*

APPLICANT: *Yes.*

TRIBUNAL: *Okay, so if they rang him and threatened him, and then after they threatened him, he gave your name as the cameraman?*

APPLICANT: Actually, he did not[8] mention my name. He said my cameraman did the work. I only established the written story. The news footage was made by the cameraman which is his job.[9]

(emphasis added)

[5] ***Deleted:*** *[name corrected]*

[6] ***Deleted:*** *why*

[7] ***Deleted:*** *details*
[7] ***Inserted:*** *name*

[8] ***Deleted:*** *not only*
[8] ***Inserted:*** *did not*

[9] ***Deleted: that the actual work has been done by me. He said that "I have just made the news"; but the news footage has been made me.***
[9] ***Inserted: my cameraman did the work. I only established the written***

story. The news footage was made by the cameraman which is his job.

TRIBUNAL: *So what did the journalist actually do?*

APPLICANT: *Journalist has filed the same story that has been reported by other media[10], they were[11] saying in England[12] that this is the same[13] madrassa from where two bomb blasters have received training. Geo News is a very popular channel in Pakistan; have a very large number of viewers.*

[10]Deleted: *channels and newspapers*

[11]Inserted: *they were*

[12]Inserted: *in England*

[13]Inserted: *same*

TRIBUNAL: *Okay, so are you saying that these people knew that you were the person who did the footage, because the journalist told them when they rang to threaten him?*

APPLICANT: *Yes. They came to know that footage was made by me.[14]*

[14]Deleted: *cameraman.*
[14]Inserted: *me.*

TRIBUNAL: *By you?*

APPLICANT: **Yes.**

TRIBUNAL: *Why would he tell them that you were the cameraman?*

APPLICANT: *It is a simple thing that reporter doesn't make the video. Only the cameraman will make a video.[15]*

[15]Deleted: *It is photograph that is made for the video.*
[15]Inserted: *Only the*

cameraman will make a video.

TRIBUNAL: *I can understand that. I know that, but what I'm saying, why would a journalist tell people who are threatening him that you were the person, the particular person who made the footage?*

APPLICANT: *I'm saying that he did not mention my name. He said that it was done by the cameraman. That's all he said.*[16]

[16] ***Inserted:*** *That's all he said.*

TRIBUNAL: *Okay, so what you're saying is in fact the journalist didn't mention you by name to the persons who were threatening him?*

APPLICANT: *Yes, but he said that this thing was done by the cameraman.*

TRIBUNAL: *By a cameraman?*

APPLICANT: *It means not any cameraman, if I have gone with him then it's my name, isn't it? If he said cameraman then it is me, isn't it? Only me and him were there from that organisation.*[17]

[17] ***Deleted:*** *If he said cameraman, that means I was the cameraman who accompanied him; that meant it was me, because from the organisation, means Geo. It was he and me who went for coverage.*

[17] ***Inserted:*** *It means not any cameraman, if I have gone with him then it's my name, isn't it? If he said cameraman then it is me, isn't it? Only me and him were there from that organisation.*

12. The first ground of review before me argues that a critical mistranslation occurred in relation to the passage which I have marked in bold, occurring at point 3 on page 6 of the transcript. At this point, the translator at the hearing attributed to the applicant a very clear statement that Mr M gave the telephone caller the applicant's name as the person who had been the cameraman for the footage. The uncorrected transcript shows:

> ***TRIBUNAL:*** *Okay, so if they rang him and threatened him, and then after they threatened him, he gave your name as the cameraman?*
>
> ***APPLICANT:*** *Actually, he not only mentioned my name. He said that the actual work has been done by me. He said that "I have just made the news"; but the news footage has been made me.*

13. On the true translation which I accept, the applicant did not say that Mr M gave the applicant's name, but in fact rejected the Tribunal's understanding of his evidence:

> ***APPLICANT:*** *Actually, he did not mention my name. He said my cameraman did the work. I only established the written story. The news footage was made by the cameraman which is his job.*

14. I find that, in fact, the applicant always maintained that Mr M only told the callers that an unnamed cameraman was responsible for the footage which had been aired. This error of translation resulted in an apparent contradiction by the applicant of himself within half a page of the transcript, and also resulted in the Tribunal incorrectly concluding that the applicant had initially given an implausible account of how the attackers obtained his name.

15. The Minister's counsel points out that, at the start of the passage I have extracted above, the applicant said *"yes"* to the Tribunal's question whether Mr M had *"told them your name"*. However, the Tribunal properly sought clarification of this response, which the applicant in fact provided. In my opinion, absent the mistranslation, the Tribunal would not have identified contradictory and implausible evidence which it thought had initially been given by the applicant.

16. The remainder of the relatively brief hearing was attended by further mistranslations which are revealed in the evidence of the applicant's expert. However, in my opinion, these blemishes did not significantly alter the gist of what was actually said by the applicant to the Tribunal, although at times what he said was garbled in translation.

17. The significance of the particular translation error which I have emphasised above is shown in the reasoning of the Tribunal. Under the

heading *"Findings and Reasons"*, the Tribunal accepted the applicant's claim to have been attacked and injured on his way home. It accepted that he had provided the broadcast footage of the madrassa linked to the overseas atrocity. However, the Tribunal said that it had *"serious reservations that the attack on the applicant … related to his filming of the madrassa"*. It noted, and apparently did not reject, circumstantial evidence supporting his linking the attack with his filming. It did not find it necessary to explore what other reasons there might have been for the applicant to have been attacked on his way home from work. Rather, its reasons for rejecting this claim relied upon particular adverse findings in relation to the applicant's evidence at the hearing, as translated to it. It identified two matters explaining a general conclusion:

> *The Tribunal found aspects of the applicant's oral evidence about threats made to him and how he knew that the threats were from [the organisation] and related to his filming of the madrassa to be unconvincing. In particular when the Tribunal sought information from the applicant as to how the [the organisation] would have known that the applicant filmed the madrassa the applicant provided a variety of explanations including that the reporter involved in covering the event had told the [the organisation] when he was threatened that the applicant was the cameraman. The Tribunal considers this to be improbable.*
>
> *Furthermore the applicant was equivocal in his evidence about what measures he took between [the date of the attack] and January 2006 (when he arrived in Australia) in relation to the threats he claims to have received. When asked what assistance he sort from his superior at work the applicant provided inconsistent evidence. He claimed that he did not tell anyone at work, he also claimed that he did tell his superior. He further claimed that his superior considered the claimed phone threats to be just prank calls yet he also claimed that the reporter associated with the madrassa report also received threats and consequently fled the country because of these threats.*
>
> *Accordingly the Tribunal does not accept that the applicant's involvement in the film footage of the madrassa was known by members of [the organisation] or created an adverse interest in him by [the organisation] such that he was subject to ongoing threats by them and that they attacked him in September 2005.*

18. In my opinion, its reasons show that it gave very significant weight to a finding that the applicant had given *"improbable"* evidence that *"the reporter involved in covering the event had told [the organisation] when he was threatened that the applicant was the cameraman"*. The Tribunal has therefore treated as pivotal to its reasoning, the mistranslation of the applicant's actual evidence which I have identified above.

19. It was common ground that authorities of the Federal Court binding upon this Court have established that a Tribunal's decision is affected by jurisdictional error if, objectively determined by the Court, the applicant has been denied an opportunity required by s.425 of the Migration Act to be given to an applicant, *"to give evidence and present arguments relating to the issues arising in relation to the decision under review"* in the course of an attendance at a hearing. There can be a breach of this requirement, even where the Tribunal is unconscious of the reason for the applicant being deprived of that opportunity (cf. *Minister for Immigration & Multicultural & Indigenous Affairs v SCAR* (2003) 128 FCR 553 at [37], and *SZFDE v Minister for Immigration & Citizenship* [2007] HCA 35 at [32], [48], [51]).

20. In particular, the Federal Court has held that mistranslations occurring at a hearing, of which the Tribunal is unaware, may give rise to jurisdictional error by reason of the failure to afford the opportunity required under s.425. A frequently cited discussion of the principles is that of Kenny J in *Perera v Minister for Immigration & Multicultural Affairs* (1999) 92 FCR 6. At [39] her Honour said:

> *39 In the United States, courts of review have reasoned that, in order to establish that a person was prevented from giving relevant evidence or that an erroneous interpretation influenced the outcome of the proceeding, the hearing record must itself disclose the poor quality of the interpretation or specific error must be shown on appropriate evidence: see* Hartooni v Immigration and Naturalization Service *at 340;* Acewicz v Immigration and Naturalization Service *(9th Cir 1993) 984 F 2d 1056 at 1062 and in a criminal trial context,* Mendiola v Texas *(Tex App 1995) 94 SW2d 157 at 162 . For present purposes, it is necessary to say only that I accept that it is open to the*

> *applicant to show by reference to the transcript of the Tribunal hearing that the interpretation was so incompetent that he was effectively prevented from giving his evidence. In evaluating the applicant's case, however, one needs to bear in mind that some infelicitous expression in the transcript may be attributable to errors in transcription, not errors in interpretation.*

21. Her Honour's suggested test of whether *"the interpretation was so incompetent that he was effectively prevented from giving his evidence"* has been applied in several cases. For example, in *VWFY v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1723 Finkelstein J concluded that generally the standard of interpretation at a Tribunal hearing had been of poor quality, so that the applicant had not been able to have his evidence properly communicated to the Tribunal. His Honour also envisaged that the test suggested by Kenny J might be met by a failure of translation in relation to a critical piece of evidence given at the hearing. He said:

> *27 My general impression is that no one error or deficiency is so severe as to show that the interpreter or the interpretation was of such poor quality that the appellant was effectively deprived of his right to appear. But, when one steps back and looks at the hearing as a whole and asks whether the appellant received a fair hearing, I think the answer is that he did not. The combination of insufficient and incomplete translations, as well as the clear factual errors on the part of the interpreter, which the appellant was fortunately able to correct in some instances, suggests that the appellant had no real opportunity to express himself and fully answer questions put to him by the tribunal. This fails to achieve the tribunal's objective of providing a fair and just hearing.*

22. The most recent decision in which the Federal Court has applied the principles in *Perera* is found in a judgment of Gray J's in *M175 of 2002 v Minister for Immigration & Citizenship* [2007] FCA 1212. At [51] his Honour assessed various errors of the interpreter, to consider their *"significance, or at least of potential significance, to the outcome of the case"*, and whether *"the errors deprived the appellant of a fair opportunity to succeed"*.

23. In the present case, upon my above findings, I have concluded that the reasoning followed by the Tribunal was materially influenced by

incorrectly translated evidence of the applicant, and that this error satisfies the tests of a failure under s.425 which the Federal Court has identified in these cases. I therefore uphold the first ground of appeal.

Ground 2 – failure to address an element in the applicant's claims

24. The Tribunal's reasoning did not end with its adverse finding as to the applicant's attribution of his assault to the terrorist organisation. It also gave an alternative reason for affirming the delegate's decision, based upon a finding that effective protection would be available to the applicant if he returned to Pakistan. Its reasoning was brief:

> *However, even if the Tribunal is wrong and the applicant has been threatened by members of [the organisation] the Tribunal does not accept that the applicant is unable to avail himself of effective state protection in the event that he were to be subject to further threats on his return to Pakistan.*
>
> *The Tribunal notes the various country information that the applicant has provided to contend that the authorities of Pakistan selectively withhold protection from journalists and in fact are not infrequently responsible for the mistreatment of journalists. The Tribunal notes that these incidents refer to specific incidents where journalists are involved in events such as the filming of an airbase in contravention of the Secrets Act or the death of journalists working in areas of high conflict such as NWFP.*
>
> *The Tribunal accepts that in some events or among some groupings of journalists such as those who have a political profile or a track record of exposing or attacking government policy, the authorities may well selectively withhold protection. However, the Tribunal considers that withholding of protection in these occasions is by reason of an (imputed) political opinion and not simply or essentially by reason [of] their profession as a journalist.*
>
> *The Tribunal notes that the applicant's career as a journalist has involved for the most part the coverage of sporting events such as cricket and other events such as the Asian Tsunami. The applicant has not made the claim to have, and in the view of the Tribunal does not have, a profile as a journalist who has opposed the government or been instrumental in political agitation. The applicant stated at the hearing that he did not have a political profile or any particular political opinions.*

> *The Tribunal does not accept the adviser's suggestion that the attack upon the applicant in September 2005 may have in fact been by (secret) agents of the state and as such the applicant cannot avail himself of state protection as it is the state that is seeking to harm him. The Tribunal considers this to be conjecture. The applicant has not made this claim himself and in fact is adamant that it was [the organisation] who attacked him.*
>
> *The Tribunal does not accept that the applicant as a member of a particular social group conceived of as journalists would be denied effective state protection on his return to Pakistan (*MIMA v Respondent S152/2003 *(2004) 222 CLR 1). The Tribunal notes in this regard that the applicant did report the incident of 11 September 2005 and that the authorities did respond appropriately.*
>
> *Accordingly the Tribunal is not satisfied that the applicant has a well-founded fear of persecution for a Convention reason upon return to Pakistan.*

25. It is plain, except in the first paragraph of the above quoted extract, that this discussion addressed a contention which had been elaborated by the applicant's solicitor in his submissions to the Tribunal: that there was support in general country information for the applicant to have a concern that protection would be withheld from him by reason of his membership of the profession of journalists.

26. The second ground of review argued before me contends that the Tribunal failed to address a different point raised by the applicant's solicitor in his written submission to the Tribunal which I have extracted above. This clearly raised a general concern that no Pakistani who was the target of attack by an extremist organisation would receive the requisite standard of effective protection from the law enforcement authorities in Pakistan.

27. The only possible indication in the Tribunal's reasons that it addressed this submission might be found in the first sentence in the paragraph commencing the above discussion. There, the Tribunal made the general statement: "*the Tribunal does not accept that the applicant is unable to avail himself of effective state protection in the event that he were to be subject to further threats on his return to Pakistan"*. However, this appears only to introduce the specific discussion which follows, addressing whether a journalist such as the applicant would be

"denied effective state protection on his return to Pakistan" by reason of his membership of that class or his perceived political opinions as a journalist. The Tribunal provided no discussion of the contentions of the applicant's solicitor when disputing the delegate's assessment of the level of protection available generally in Pakistan to persons targeted by extremist organisations.

28. In the present case, I am prepared to infer from the absence of such discussion, that the Tribunal overlooked the need to address important contentions in relation to the adequacy of state protection which were before it. I consider it likely that the Tribunal was distracted by the elaboration of a different concern, provided in the later submissions of the applicant's solicitor. However, the general contention had been clearly articulated before the Tribunal, including by way of evidence given by the applicant at the hearing. At page 23 of the transcript he said:

> ***TRIBUNAL:*** *Is there something else you would like to tell me about?*
>
> ***APPLICANT:*** *Yes. People becoming target for terrorists.*
>
> …
>
> ***APPLICANT:*** *What I want to say is that Australia is spending a lot of money and making huge efforts to protect its citizens from diversity [sic: adversity ?]. Nothing is being happened in Pakistan. They are not doing anything to protect their people from terrorists and I have been known by the terrorists. I would be the easy target. Pakistan has been attacked twice. He travels wearing bulletproof jacket. He has - - -*
>
> ***TRIBUNAL:*** *Who's this?*
>
> ***INTERPRETER:*** *The president of Pakistan.*

29. In its earlier boiler plate recitation of legal principles, the Tribunal correctly identified that *"the persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality"*, which points to an element which is required to be addressed where the persecution which is feared is that of a non-State agency. Authorities in the Federal Court and High Court have explored the standard of protection which should

be considered in a case such as the present, in particular as to whether the persecution is *"uncontrollable"* by the authorities of the country of nationality. There is support in the Federal Court that a Tribunal is required to consider, at least in circumstances where there were grounds for concern, whether the state authorities would have measures available *"sufficient to remove a real chance of persecution"* (see *SGNB v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 132 FCR 192 at [32]-[35], where Selway J discussed the judgment of Lindgren J in the Full Court *Minister for Immigration & Multicultural Affairs v Prathapan* (1998) 86 FCR 95. See also my discussion of this point in *SZEQI v Minister for Immigration & Anor* [2005] FMCA 1615 at [28]-[40] – I note from *SZEQI v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCAFC 94 that an appeal to the Full Court did not proceed).

30. More recently, the Full Court in *SZDWR & Anor v Minister for Immigration & Multicultural & Indigenous Affairs & Anor* (2006) 149 FCR 550 has identified the relevant test from passages in the High Court judgment in *Minister for Immigration & Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at [28]:

> *18. … The standard of protection referred to in the cases is that of a reasonably effective police force and a reasonably impartial system of justice …*

(See also *Respondents S152/2003* at [16], [19] and [26]).

31. In the present case, the applicant's contentions in response to the delegate's reasoning clearly, in my opinion, raised a need for the Tribunal to address whether any Pakistani in the position of the applicant, who claimed to have become the target of retaliation by a terrorist organisation in Pakistan, would receive effective protection from the Pakistani authorities according to this standard.

32. In my opinion, the Tribunal failed to perform any consideration of this important issue, and this provides a second jurisdictional error affecting its decision. I would therefore uphold the second ground also.

33. Since I have upheld both grounds of review, vitiating both elements in the Tribunal's reasoning, there is no reason I should withhold relief from the applicant.

I certify that the preceding thirty-three (33) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 18 September 2007